

SUPPLEMENTARY BENEFIT

**NOTE ISSUED ON THE AUTHORITY OF
THE CHIEF COMMISSIONER**

Resources—money possessed by solicitor as agent for client is actual, not notional, resource of client; no speculation as to avoidance measures.

The claimant appealed to a social security appeal tribunal against a decision that £2,322.79 supplementary benefit had been overpaid and was recoverable by the Secretary of State. On 15 January 1985 that tribunal disallowed the claimant's appeal.

The claimant appealed to the Commissioner who in his decision dated 24 February 1986 allowed the appeal and remitted the case for rehearing before a differently constituted social security appeal tribunal with directions for its redetermination.

The claimant applied to the Court of Appeal for leave to appeal to that Court, leave having been refused by the Commissioner.

On 11 February 1987 the Court of Appeal (Stephen Brown and Russell LJJ) refused the application, and *held* (confirming the Commissioner):

1. that the sum of £12,000 held by a solicitor for the claimant was an actual resource of his, not a notional resource, for the purposes of supplementary benefit;
2. that it would be wrong to require the social security appeal tribunal to which the appeal had been remitted by the Commissioner to speculate what avoidance measures the claimant might have taken had he been informed by Department of Health and Social Security that he had a capital resource over the capital limit.

The Judgment of the Court of Appeal is set out in full below. The facts of the case are sufficiently set out in that Judgment.

LORD JUSTICE STEPHEN BROWN
LORD JUSTICE RUSSELL

DAVID EDWARD THOMAS

Applicant

v.

THE CHIEF ADJUDICATION OFFICER

Respondent

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, WC2A 3RU).

MR. PATRICK LAWRENCE (instructed by Messrs. John Bowdler, Shrewsbury) appeared for the Applicant.

MR. D. JAY (instructed by D.H.S.S. Solicitor's Office) appeared for the Respondent.

JUDGMENT

(Revised)

A LORD JUSTICE STEPHEN BROWN: I shall ask Lord Justice Russell to deliver the first judgment.

LORD JUSTICE RUSSELL: This is an application for leave to appeal from a decision of Mr. Commissioner Goodman, a Social Security Commissioner, dated 24 February 1986 whereby he gave certain directions to the Social Security Appeal Tribunal, which was and is to re-hear an

B appeal by the appellant against a decision of the Secretary of State to claim back from him the sum of £2,322.79 overpaid supplementary benefit.

The case involves two short points of construction of provisions of the Supplementary Benefits Act 1976 and the regulations made under that statute, namely the Supplementary Benefit Resources Regulations 1981.

C Before I move to those two points it will be convenient briefly to rehearse the factual background which falls within a small compass and can be shortly stated. On 26 June 1978 the applicant was seriously injured in a road traffic accident and thereafter until very recently was unable to work. On 9 February 1983 solicitors acting for Mr. Thomas, the applicant, received on his behalf the sum of £12,000 in settlement of the applicant's claim for damages for personal injuries arising out of the accident. Between that date and 9 December 1983 supplementary benefit to the extent of £2,322.79 was paid. On 9 December 1983 through his solicitors the appellant used the £12,000 for the purchase of a house. When the Secretary of State, through his adjudicating officer, discovered that the £12,000 had not been disclosed as a capital asset, he decided to seek to recover the over-payment to which I have referred. The decision of the adjudicating officer was upheld by a

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E Social Security Appeal Tribunal. A further appeal to the Social Security Commissioner was allowed. He remitted the case for re-hearing before the tribunal but, as he was entitled and indeed required to do, he gave the tribunal certain directions as to their approach to the matter on the re-hearing, and it is those two directions which are the subject matter of this application for leave to appeal.

F Part II of the Supplementary Benefits Regulations is headed "Capital Resources" and among capital resources that are to be disregarded in calculating a claimant's application for supplementary benefit is the value of a home. Regulation 4, so far as it is material, reads as follows:

"4. (2) Any resource which either—

G (a) would become available to a member of the assessment unit"—that means the claimant—"upon application duly being made, but which has not been acquired by him; or

- A** (b) is due to be paid to a member of the assessment unit but—
 (i) has not been paid to him, and . . .
 may if, in the opinion of the benefit officer it is reasonable in the circumstances to do so, be treated as if it were possessed by him.”

In other words, under that regulation, where funds are not in the possession of the claimant in the circumstances there described, a discretion is given to the appropriate officer as to how those funds are to be dealt with in assessing benefit. Conversely, however, under regulation 5 (and I paraphrase the regulation) actual resources which are in the possession of the claimant are to be taken into account.

- C** The argument for the applicant here under these regulations is that the £12,000, which remained in the hands of the applicant’s solicitors for ten months between 9 February 1983 and 9 December 1983, was not caught by regulation 5 but was a notional resource under regulation 4 in the sense that the £12,000 was not in the actual possession of the claimant but was, to use the words of regulation 4, a resource which either would become available to the claimant upon application being made by him or was due to be paid to him but had not yet been paid to him.

- D** In my judgment, the possession of this money by the solicitor as the agent for the claimant was, in every sense of the term, possession by the claimant, and regulation 4 has no application to a situation where a solicitor holds funds on behalf of his client. In his decision the Commissioner drew a parallel—in my view, a perfectly legitimate parallel—between the position of a solicitor holding funds for a client and the position of a bank holding funds for a customer. For my part, I am abundantly satisfied that this £12,000, from the moment it came into the hands of the solicitor until he parted with it in purchasing the house, was a capital resource which it was the obligation of the claimant to disclose and was an actual resource within the meaning of regulation 5 as opposed to regulation 4. So much for the first ground of appeal.

- F** The second ground of appeal relates to a direction given by the Commissioner to the Appeal Tribunal which is to be found in paragraphs 15 and 16 of the Commissioner’s decision. Mr. Lawrence submitted to the Commissioner, and repeats his submission to this court, that, in assessing what sums the Secretary of State incurred by way of expenditure in consequence of the failure of the claimant to disclose the £12,000, the Secretary of State should speculate as to what might have happened had disclosure been made. Mr. Lawrence submits that the Secretary of State should take into account, at least as a possibility, that, had the existence of

A this £12,000 come to the notice of the Secretary of State a week or so after 9 February 1983, the applicant would then have been entitled promptly to purchase a house with the money and thereby avoid the implications of the regulations which require capital resources to be taken into account.

The Commissioner had this to say about that submission in paragraph 16 of his decision:

B “In my view, it would be wrong to require an adjudicating authority to speculate as to what ‘avoidance’ measures a claimant might have taken had he been informed by the Department that he had a capital resource over the capital limit”.

With that observation I, for my part, agree. One needs look no further than the section itself to see what it is that is contemplated. Section 20, so far

C as it is material, reads as follows:

“20. (1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure—

(a) The Secretary of State incurs any expenditure under this Act;

...

D the Secretary of State shall be entitled to recover the amount thereof from that person.”

In the instant case it is common ground that the sum of £12,000 remained in the hands of the solicitor for ten months and that during that ten months, because the Secretary of State was ignorant of its existence, £2,000 odd had been paid out by way of supplementary benefit. It is, in my view, unarguable that that £2,000 was paid otherwise than in consequence of the

E failure to disclose the existence of the £12,000.

Although Mr. Lawrence has valiently repeated the submissions he made to the Commissioner before this court and has sought to persuade us that this is a case where leave should be given to appeal and that the appeal should be allowed, for my part I have to say that I regard the two grounds of appeal here as really unarguable and, accordingly, I would not give the

F applicant leave to appeal.

LORD JUSTICE STEPHEN BROWN: I agree.

Order: Application refused. No order
for costs. Legal aid taxation of
Applicant's costs.
